

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE  
(PPA) PRODUCTS LIABILITY  
LITIGATION,

MDL NO. 1407

ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT AND  
GRANTING MOTION TO WITH-  
DRAW

This document relates to:

*Fuller v. Whitehall-Robbins  
Healthcare, C03-425*

This matter comes before the court on a motion for summary judgment filed by defendant Wyeth and a subsequent motion to withdraw filed by plaintiff's attorney, Brenda Ford. Having reviewed the briefs and exhibits filed in connection with these motions, the court finds and rules as follows.

Plaintiff Betty Fuller, on behalf of herself and her deceased husband Bradley Fuller, filed this case on November 9, 2002, alleging that Mr. Fuller's January 10, 2001 stroke was related to ingestion of certain PPA-containing medication.

The instant summary judgment motion is based on this court's June 18, 2003 *Daubert* ruling, in which the court held inadmissible any evidence related to injuries alleged to have occurred more than 72 hours after ingestion of a PPA-containing product.

1 In this case, Wyeth claims that plaintiff has been unable to  
2 adduce any conclusive evidence that he ingested the only Wyeth-  
3 manufactured product that has ever contained PPA, Robitussin CF.  
4 Instead, the bulk of testimony offered on plaintiff's behalf  
5 suggests that plaintiff, in fact, took only Robitussin DM, which  
6 does not contain, and never has contained, PPA.

7 In response, however, plaintiff submits the testimony of  
8 Brenda Ford, Mr. Fuller's niece. Ford stated in deposition and in  
9 an affidavit filed with the response that she observed a bottle  
10 of Robitussin CF in the Fuller household in the days leading up  
11 to the stroke, and that she witnessed Mr. Fuller taking the  
12 medication on two occasions on January 7, 2001, within 72 hours  
13 of his stroke.

14 While under ordinary circumstances Ford's testimony unques-  
15 tionably raises an issue of material fact, Wyeth argues that in  
16 this case the testimony is "inherently unreliable" and should be  
17 "disregarded". Wyeth's position is based on the improbable fact  
18 that Brenda Ford is also the Fullers' attorney in this case,  
19 having represented them from its inception. In support, Wyeth  
20 cites the Louisiana Rule of Professional Conduct 3.7, which  
21 provides that "[a] lawyer shall not act as advocate at trial in  
22 which the lawyer is likely to be a necessary witness" absent  
23 certain circumstances not applicable here.

24 Wyeth's resort to the rule, however, is unavailing. The rule  
25 relates to testimony at trial, not at the summary judgment stage.  
26 Indeed, in an attempt to comply with the rule Brenda Ford has

1 moved to withdraw. Wyeth opposes the motion, asserting that Ford  
2 should not be allowed to remove from her testimony the "taint" of  
3 the fact of her representation. Wyeth has failed, however, to  
4 submit legal support for denying Ford the opportunity to withdraw  
5 as counsel and testify on her family's behalf. The court there-  
6 fore grants Ford's motion to withdraw.<sup>1</sup>

7       Whether Ford's actions have been rigorously ethical is not a  
8 question before the court; the only question is whether her  
9 testimony -- which admittedly creates a genuine issue of material  
10 fact -- would be admissible at trial. As she is no longer plain-  
11 tiffs' attorney, the evidence before the court at this point  
12 indicates that the answer to that question is yes.

13       Wyeth also submits that Ford's testimony is unbelievable,  
14 not only because she allegedly had something to gain from it, but  
15 also because she testified that Mr. Fuller ingested Robitussin CF  
16 only after it became clear that the CF formula was the only  
17 Robitussin that ever contained PPA. Wyeth moves under Federal  
18 Rule of Evidence 403 for suppression of Ford's testimony, arguing  
19 that the prejudicial nature of the testimony outweighs its  
20 probative value. The believability of a witness, however, is the  
21 unique province of the jury. Wyeth will have ample opportunity to  
22 assail the credibility of the witness and her testimony at trial.

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24       <sup>1</sup>The motion to withdraw is granted only as to Brenda Ford.  
25 It is the court's understanding and intention that the Fullers  
26 continue to be represented by other attorneys with the Piper &  
Associates law firm, and specifically by remaining counsel of  
record, Robert Piper, Jr.

1 On summary judgment, however, the question is only whether such  
2 evidence exists, not whether it is credible.

3 For the foregoing reasons, Wyeth's motion for summary  
4 judgment is DENIED. Plaintiffs' counsel's motion to withdraw is  
5 GRANTED. Wyeth's motion to substitute certain summary judgment  
6 exhibits is GRANTED as unopposed.

7 DATED at Seattle, Washington this 28th day of August, 2006.

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10 UNITED STATES DISTRICT JUDGE  
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